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Supreme Court, U.S.
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NO. _____

In the Supreme Court of the United States

WENDELL J. CALLAHAN, JR. and
JEROME M. COUSAN,
Petitioners

v.

CIRCUIT CITY STORES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
Louisiana Supreme Court
New Orleans, Louisiana, No. 2007-C-2424

PETITION FOR WRIT OF CERTIORARI

EMERY VOORHIES
616 E. Boston St.
Covington, LA 70433
Phone: (985) 898-0940
La. Bar Roll #13124
Counsel of Record for Petitioners

Maurice Le Gardeur
222 N. Massachusetts St.
Covington, LA 70433
Phone: (985) 892-1420
La. Bar Roll #8274

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QUESTIONS PRESENTED FOR REVIEW

1. Did the appellate courts of Louisiana properly grant a qualified immunity to a private citizen for defamatory complaints of crime concerning other private citizens who, as a result, were wrongfully arrested?

2. Did the Louisiana Supreme Court act unconstitutionally when it adopted the *actual malice standard* in *Kennedy v. Sheriff of East Baton Rouge,* 935 So.2d 669 (La.7/10/06) and extended it beyond a grant of qualified immunity for simple defamation to a defendant under the *free speech* clause of the First Amendment thereby conferring additional immunity for a violation of an innocent victim's Fourth Amendment due process right to be free from unlawful arrest?

3. When private parties act as police deputies to a detention and/or arrest of suspects beyond the geographical limitations of LSA-C.Cr.P. Art. 215, should they be held to the same probable cause standards as the police and not a lesser reasonable suspicion or good faith standard?

LIST OF PARTIES TO THE PROCEEDING

1. Wendell J. Callahan, Jr.
   Petitioner/Plaintiff

2. Jerome M. Cousan
   Petitioner/Plaintiff

3. Circuit City Stores, Inc.
   Respondent/Defendant

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STATEMENT OF JURISDICTION

In this case a state court has decided an important question of federal law that has not been, but should be, settled by this Court.

In *Kennedy,* the Louisiana Supreme Court extended the *Gertz*[1] rationale to cases involving a private, non-media plaintiff and a private, non-media defendant by asserting without support that *"there appears to be no reason to distinguish between media and non-media defendants in this regard." Kennedy,* 935 So.2d at 678. This statement belies the fact that this Court has never extended the *Gertz* rationale in such a manner. Moreover, it is still an open question whether the *Gertz* rationale can be extended to non-media defendants, and various states have come to different conclusions. Many states have concluded that such an extension is inappropriate. *See, e.g., Stuempges v. Parke, Davis & Co.* , 297 N.W.2d 252 (Minn. 1980); *Rowe v. Metz,* 195 Colo. 424 (1978); *Denny v. Mertz,* 106 Wis.2d 636 (1982). Other states have come to the opposite conclusion. *See, e.g., Antwerp Diamond Exchange, Inc. v. Better Business Bureau,* 130 Ariz. 523 (1981). Considering the split of authority, and the fact that this is an important question of constitutional law, this Court has a strong interest in addressing the matter.

On February 15, 2008, the Louisiana Supreme Court entered a judgment denying Petitioners'

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[1] *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974)

application for writ of certiorari to review the opinion of the Louisiana First Circuit Court of Appeal which, by a 5-judge panel decision, split 3-2 to reverse the trial court's judgment awarding damages to the Petitioners.

This case has important ramifications for the bench, bar, and the public interest in determining the scope and nature of an alleged *qualified immunity* under the First Amendment when false complaints are communicated to law enforcement officers.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTORY PROVISIONS

LSA-C.Cr.P. Art. 215

Detention and arrest of shoplifters

A.(1) A peace officer, merchant, or a specifically authorized employee or agent of a merchant, may use reasonable force to detain a person for questioning on the merchant's premises, for a length of time, not to exceed sixty minutes, unless it is reasonable under the circumstances that the person be detained longer, when he

has reasonable cause to believe that the person has committed a theft of goods held for sale by the merchant, regardless of the actual value of goods. The merchant or his employee or agent may also detain such a person for arrest by a peace officer. The detention shall not constitute an arrest.

(2) A peace officer may, without a warrant, arrest a person when he has reasonable grounds to believe the person has committed a theft of goods held for sale by a merchant, regardless of the actual value of the goods. A complaint made to a peace officer by a merchant or a merchant's employee or agent shall constitute reasonable cause for the officer making the arrest.

* * * * *

STATEMENT OF THE CASE

Petitioners filed a civil action in defamation, false arrest, false imprisonment, and malicious prosecution against Respondent Circuit City for damages before the 22nd Judicial District Court for the Parish of St. Tammany, State of Louisiana. A *qualified immunity* defense under the First Amendment was raised by the Respondent in its Answer. (A-38, at paragraph 18)

After a trial on the merits, the judge awarded Petitioners, Wendell Callahan and Jerome Cousan, general and special damages finding defendant, Circuit City, liable for negligent misidentification and wrongful arrest of the Petitioners for alleged shoplifting. The trial court overruled Respondent's *qualified immunity* defense. (A-22)

Circuit City took a suspensive appeal to the Louisiana First Circuit Court of Appeal. Between the time of trial and appellate review, the Louisiana Supreme Court handed down the *Kennedy* decision which decided that a *malice standard* or burden of proof was necessary to overcome a good faith immunity defense in cases involving defamation or false accusation of criminal activity between private citizens. Because of *Kennedy,* the First Circuit ordered a 5-judge panel review which split 3-2 to reverse the lower court's award of damages. The appellate court found Circuit City entitled to *qualified immunity* on appeal. (A-3) Thereafter, Petitioners sought a rehearing *en banc* before the First Circuit, where Petitioners raised Fourth Amendment concerns,

which was denied. (A-32) Thereafter, the Louisiana Supreme Court denied further review including all constitutional issues with a lone dissent (A-1), provoking this writ application to the U.S. Supreme Court.

Kennedy has gone further than any case decided by the U.S. Supreme Court in holding that a *malice standard* is required to recover damages for defamation between private (non-media) citizens. It is submitted that *Kennedy* has gone too far and this erroneous decision should be corrected by this Court through its review process.

SUMMARY OF THE ARGUMENT

Petitioners do not dispute that *Kennedy* applies to this case. In *Kennedy* the Louisiana Supreme Court determined that under certain circumstances a *qualified immunity* from civil liability is afforded to individuals who make statements to the police, even if those statements result in the violation of the civil rights of innocent victims.

In the case at bar, the Louisiana First Circuit Court of Appeal reversed the judgment of the trial court which awarded the plaintiffs general and special damages. *Callahan v. Circuit City Stores, Inc.,* 971 So.2d 1116, 2006-1663 (La.App. 1 Cir. 10/10/07). The appellate court reasoned that Circuit City was *merely negligent* and that this alone was insufficient to *prove an abuse of the privilege asserted by the defendants for reporting the possibility of criminal behavior. See Kennedy,* 05-1418 at p. 31, 935 So.2d at 689.

However, the appellate court was misguided in its analysis. It failed to take into account factual considerations that indicate that Circuit City violated the standards expressed in *Kennedy* and raised on rehearing to the court of appeal as well as in Petitioners' writ application to the Louisiana Supreme Court.

It is submitted that it is unconstitutional to utilize rights granted one citizen under the First Amendment to abridge rights due another citizen under the Fourth Amendment.

The U.S. Supreme Court should grant a writ of certiorari in this case to consider the legal errors committed by the appellate court which have caused a material injustice and reexamine *Kennedy* in light of these factors and the Fourth Amendment.

Petitioners adopt by reference the dissenting opinion of Judge Hughes of the Louisiana First Circuit Court of Appeal in support of affirming the judgment of the lower court which suggests the application of a *gross negligence* standard vice a *malice standard* in cases of *defamation plus* where serious consequential harm occurs to aggrieved parties, not merely tarnishing of personal reputations. (See A-18 through A-21.)

ARGUMENT

Kennedy is inapposite

Petitioners do not dispute the contention that *Kennedy* heightened the standard of a plaintiff's burden of proof regarding statements made to the police in a defamation suit. *Kennedy* stands for the proposition that a plaintiff must demonstrate *knowledge or reckless disregard as to falsity* in order to meet the burden of proof in such claims. *Kennedy,* 935 So. 2d at 684.

However, *Kennedy* can be distinguished from the case at bar, and should not persuade this Honorable Court to uphold the appellate judgment in favor of Respondent. *Kennedy* involved a man who paid for food and drinks with an allegedly counterfeit 100 dollar bill. *Id.* at 673. Their suspicions aroused, workers at the restaurant called the police which resulted in the plaintiff being handcuffed and brought to the local police station. *Id.* After it was determined that the questionable 100 dollar bill was in fact genuine, the plaintiff was released and the currency was returned. *Id.*

In this case, the Petitioners were handcuffed, arrested, detained, jailed, booked, and arraigned before the St. Tammany Parish District Attorney's office determined that the overwhelming evidence of the Petitioners' innocence did not warrant prosecution.

Thus, *Kennedy* involved primarily First Amendment issues while this case deals with more

important Fourth Amendment concerns. It cannot be denied that the Fourth Amendment was at issue in *Kennedy* because the plaintiff in that case was handcuffed and therefore *seized* for the purposes of the Fourth Amendment. *See e.g. Florida v. Bostick,* 501 U.S. 429 (1991). However, while Justice Weimer's opinion in *Kennedy* contains an extensive discussion of First Amendment defamation issues in the context of *New York Times v. Sullivan,* 376 U.S. 254 (1964), it totally ignores any discussion of the Fourth Amendment. Petitioners do not disagree that there is a strong governmental interest in protecting communications to police as a *fertile field for criminal suppression. Kennedy*, 935 So.2d at 683. However, in the instant case, a majority of the Louisiana First Circuit Court of Appeal discounted the importance of additionally protecting innocent people from Fourth Amendment violations due to false statements made to police. The *Kennedy* court wrote about the need to strike *a necessary and appropriate balance between a person's interest in protecting his or her reputation and the need to encourage individuals to report suspected criminal activity to the proper authorities. Kennedy,* 935 So.2d at 685. (emphasis supplied)

Petitioners do not dispute that there is an important interest in encouraging citizens to report crimes and suspicious activities to the police. However, the need of Petitioners Callahan and Cousan to protect their respective reputations in the community was wholly subservient to the primary need to maintain their liberty and freedom which was the vital concern in this case.

This case can be further distinguished from *Kennedy* when the extent and nature of the communications made to police are taken into account. In *Kennedy,* the police were called immediately after the restaurant employees suspected the 100 dollar bill as being counterfeit. The police arrived almost immediately and took the plaintiff away. To that end, the Supreme Court held that *the report to law enforcement officers of suspected criminal activity ... was conditionally privileged.* However, in this case, a report was made to the police by Circuit City employees, and Hines, one of the employees, subsequently began to chase the suspects in his car, while on the phone with police. The Respondent, Circuit City, therefore is attempting to impermissibly extend the nature of the conditional privilege into an area not envisioned or even considered by *Kennedy.*

The police serve the public for a reason. To allow the conditional privilege to be extended in such a case would encourage citizens to engage in their own vigilante-style policing whenever they feel they have been aggrieved. The only requirement would be to call the police first, in order to establish that there has been a communication for the purposes of *Kennedy.* While the need for citizen communication with police is strong, an even stronger need is the necessity of police work without undue interference, and for this reason any conditional privilege should not be extended beyond *Kennedy.*

A reckless disregard as to falsity

Assuming, *arguendo*, that while comments to police should normally be protected by a conditional or qualified privilege, the comments in this case were made with a *reckless disregard* as to their falsity. *Black's Law Dictionary* defines *recklessness* (in part) as the state of mind in which the *actor does not desire harmful consequence but nonetheless foresees the possibility [of harm occurring]. Disregard* is defined (in part) as the *action of ignoring or treating without proper respect or consideration.* Thus the term *reckless disregard* in this context may be properly thought of as making statements without proper respect or thought but with the foresight of harm occurring. The *Kennedy* court expressed this standard as one being *so inherently improbable that only a reckless man would have communicated it. Kennedy,* 935 So.2d at 689.

Morris

In this case, Morris, the store manager, testified that he saw two men in Circuit City; one was wearing a light t-shirt, the other a dark t-shirt, and both men were wearing long blue jeans. When Petitioners Callahan and Cousan were taken into custody approximately fifteen minutes later, Cousan was wearing black pants and a Wendy's uniform shirt, Callahan was wearing jean shorts, a white shirt, and a University of North Carolina baseball cap. This was clearly shown on the Wal-Mart surveillance tape at 4:33pm. Yet Morris not only identified Cousan and Callahan as present at the scene of the crime, but

testified under oath that he saw Callahan in Circuit City at approximately 4:30pm. Moreover, Morris admitted at trial that he had not seen Cousan in Circuit City but positively identified him at the scene of the arrest merely because *[h]e was with the person I directly saw in the store.* R. at 25. Although this testimony alone arguably constitutes reckless disregard for the falsity of Cousan's identification, additional support for the proposition can literally be found in Cousan's hair. Morris testified that both of the men he saw in Circuit City had short hair. However, when Cousan was apprehended, he had a *distinctive afro hairstyle.* Guidry, J. (dissenting). It is *inherently improbable*[2] that Callahan and Cousan fled Circuit City on foot, dumped the video games at Kentucky Fried Chicken, ran approximately one-half mile to Wal-Mart where they changed their clothes, disposed of the clothes they had worn in Circuit City, left Wal-Mart in a getaway car they had stashed there, were stopped by the police, and were positively identified by Morris, all in a span of fifteen minutes. Morris' identification of Cousan can be seen as being made with total reckless disregard as to its falsity; he had absolutely no basis for identifying Cousan in Circuit City, yet positively identified him at the scene based on *association* despite the fact his clothes and hairstyle were completely different. Morris clearly acted with a reckless disregard as to the statements he made to police, therefore, such statements should not be protected by qualified privilege.

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[2] *Kennedy,* supra.

Hines

A similar argument can be made with respect to the Circuit City employee, Hines. Hines did not see the faces of the two men in Circuit City, nor at any time prior to his identification. The only thing that Hines saw prior to commencing the chase was the backs of two black men running away from Circuit City with Morris running after them. After Hines proceeded to follow the men in his car, he encountered them dumping the video games at or near the front of the Kentucky Fried Chicken. At that time, Hines testified that he *could not describe the face[s] [of the two men].* R. at 77. Hines stopped to collect the PlayStation II games which caused him to lose sight of the men. As soon as Hines saw Callahan's gold Cutlass heading towards him he immediately identified the two black men in the car as the perpetrators of the Circuit City theft, without any good faith basis for doing so other than race. Therefore, Hines acted with *reckless disregard* with respect to the statements he made to the police on his cell phone which set the whole arrest and prosecution in motion.

No harm no foul

Kennedy can be further distinguished from the case at bar on the basis of *fundamental fairness.* In *Kennedy,* the plaintiff was handcuffed and brought to the police station where it was quickly determined that the 100 dollar bill was genuine, and he was immediately released. From all indications, he did not suffer any direct financial loss as a result of his brief detention. Cousan and Callahan's plight was much

more grievous. Both men had to be bailed out of jail; Cousan needed a bail bondsman and lost his job at Wendy's, and Callahan's car was towed and he lost significant wages. Both Callahan and Cousan suffered substantial damages as a result of the false accusations and arrest, and both nearly faced jail sentences. But for the Wal-Mart videotape, they probably would have received long jail sentences as Morris continued his wrongful identification of Callahan and Cousan throughout the trial of this civil matter. All of this could have been avoided but for the negligent and reckless misidentifications by both Morris and Hines. The Louisiana First Circuit Court of Appeal lists *O'Conner v. Hammond Police Department,* 439 So.2d 558 (La. App. 1 Cir. 1983) and *Keppard v. AFC Enterprises, Inc.,* 802 So.2d 959 (La. App. 4 Cir. 2001) as providing support for its position, but both of these cases deal specifically with malicious prosecution which requires proof of malice by its very definition. *Keppard* used the malice standard as articulated in *Miller v. East Baton Rouge Parish Sheriff's Dept.*, 511 So.2d 446, 453 (La. 1987) which reads thus:

> *Malice is found when the defendant uses the prosecution for the purpose of obtaining any private advantage, for instance, as a means to extort money, to collect a debt, to recover property, to compel performance of a contract, to "tie up the mouths" of witnesses in another action, or as an experiment to discover who might have committed the crime.*

Such a standard obviously should be limited to cases of malicious prosecution due to the references to *prosecution* and *witnesses*. *O'Conner* required a showing that the statement at issue was made *with knowledge that it is false or with reckless disregard for whether it is false or not*. *O'Conner*, 439 So.2d at 561. This is essentially the same standard that the *Kennedy* court used to deny relief to Mr. Kennedy. Due to the factual distinctions outlined above, this standard should not control this Honorable Court's judgment. *Kennedy* should not be extended any further beyond its limited facts.

The Louisiana Code of Criminal Procedure Sets the Standard

Finally, and most importantly, the Louisiana First Circuit Court of Appeal and the Louisiana Supreme Court should not have ignored the applicability of LSA-C.Cr.P. Art. 215 in this case, which already grants limited immunity to merchants who follow its dictates and sets the standard in this case. There is no need to jurisprudentially expand the legislative immunity specifically provided to merchants in this case by raising the bar to a *malice standard*. If Circuit City had availed itself of the privileges afforded under LSA-C.Cr.P. Art. 215 when the perpetrators were inside the Circuit City store, Callahan and Cousan would never have been denied their Fourth Amendment Constitutional rights over a mile down the highway.

In fact, had the Louisiana Supreme Court considered LSA-C.Cr.P. Art. 215 in deciding *Kennedy*,

said statute would have provided the identical immunity to Jack-in-the-Box that Justice Weimer struggled to expand by adopting the all-encompassing *malice standard* to communications of potential criminal activity to police.

Since Circuit City chose not to comply with LSA-C.Cr.P. Art. 215 when it clearly had the opportunity, but instead allowed the shoplifters to exit the store and parking lot with no attempt to detain them, Circuit City should not be granted immunity when innocent third party victims are ensnared in the criminal justice system through Circuit City's fault – malicious or not. Comment (e) to LSA-C.Cr.P. Art. 215 provides as follows:

> *If the peace officer, merchant, or employee does not comply with the terms of the first paragraph, the detention will not be authorized and there should be no immunity.* (emphasis supplied)

CONCLUSION

As Judge Badeaux stated in his oral reasons for judgment:

> *Let me just, lastly, add, I make this decision because while I understand the need to report a crime and although I understand that Mr. Morris had no malice, instead he was merely just negligent, I can't give Circuit City a pass on this. The resulting damage was just too much to have these guys yanked out of their car, arrested, thrown in jail. In Mr. Cousan's case, spend the night in a holding cell on a concrete floor, have to go to court; in Mr. Callahan's case, several times, and incur all these expenses and then tell them, sorry, there was no mal intent.*

(*See* A-29)

And as Judge Hughes succinctly stated in his dissent when the Louisiana First Circuit Court of Appeal reversed Petitioners' award of damages:

> *It is respectfully submitted that the law applied to a literary or political dust-up is procrustean when applied to an innocent private individual who ends up in jail as the result of a false statement. Gross negligence should not be excluded from the analysis when loss of liberty results.*

"Reckless" by definition does not rise to the level of intentional or knowing behavior. Supreme Court cases that included "reckless disregard" to water down the harsh actual malice standard should not be used to raise the bar for private individuals who suffer actual, physical damage.

* * * * *

False statements that send the innocent to jail should be scrutinized more closely than mere name calling, even while recognizing and protecting the privilege for reports to the police. A constitutionally based conditional or qualified privilege becomes meaningless when it results in the loss of the ultimate constitutional right, liberty. There should be no hesitation to call the police, but there should be some thought.

(*See* A-18 - A-21)

WHEREFORE, Petitioners pray that after due proceedings had, there be judgment herein in their favor reversing the Louisiana First Circuit Court of Appeal and reaffirming the judgment of the 22nd Judicial District Court for the Parish of St. Tammany, State of Louisiana, awarding Petitioners damages since Circuit City's employees were guilty of *gross negligence* and therefore Respondent Circuit City is not entitled to a *qualified immunity* defense under the First Amendment. (*See* A-29)

Respectfully submitted,

EMERY VOORHIES
616 E. Boston St.
Covington, LA 70433
Phone: (985) 898-0940
La. Bar Roll #13124
Counsel of Record for Petitioners

Maurice Le Gardeur
222 N. Massachusetts St.
Covington, LA 70433
Phone: (985) 892-1420
La. Bar Roll #8274

The Supreme Court of the State of Louisiana

Wendell J. Callahan, Jr. and
Jerome M. Cousan — No. 2007-C-2424
vs.
Circuit City Stores, Inc.,
Employees A, B, and C of
Circuit City Stores, Inc., and
XYZ Insurance Company

IN RE: Callahan, Wendell J. Jr.; Cousan, Jerome M.; - Plaintiff(s); Applying for Writ of Certiorari and/or Review, Parish of St. Tammany, 22nd Judicial District Court Div. I, Nos. 2004-12002; to the Court of Appeal, First Circuit, No. 2006 CA 1663

February 15, 2008
Denied.

PFC
CDK
JPV
CDT
JTK
JLW

JOHNSON, J., would grant.

Supreme Court of Louisiana
February 15, 2008

/s/ Katherine A. Fontana
Deputy Clerk of Court
For the Court

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA

RE: Docket Number 2006-CA-1663

Wendell J. Callahan, Jr. and Jerome M. Cousan
-- Versus –
Circuit City Stores, Inc., Employees A, B, and C
of Circuit City Stores, Inc. and XYZ Insurance Co.

22nd Judicial District Court
Case # 200412002
St. Tammany Parish

On Application for Rehearing filed 10/23/2007
Rehearing **Denied**

/s/ Randolph H. Parro

/s/ John M. Guidry
dissents and would grant
rehearing en banc

/s/ E. James Gaidry

/s/ Page McClendon

/s/ Jefferson D. Hughes
would grant rehearing

Filed November 15, 2007
/s/ Christine L. Crow, Clerk

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT
NO. 2006 CA 1663
WENDELL J. CALLAHAN, JR. AND
JEROME M. COUSAN
VERSUS
CIRCUIT CITY STORES, INC.,
EMPLOYEES A, B, AND C OF
CIRCUIT CITY STORES, INC., AND
XYZ INSURANCE COMPANY

Judgment Rendered:
October 10, 2007

* * * * * *

Appealed from the Twenty-Second Judicial
District Court In and for the
Parish of St. Tammany
State of Louisiana
Suite No. 2004-12002
Honorable Reginald T. Badeaux, III Presiding

* * * * * *

Emery Voorhies Maurice LeGardeur Covington, LA	Counsel for Plaintiffs/Appellees Wendell J. Callahan, Jr. and Jerome M. Cousan
Robert W. Barton Matthew L. Mullins Baton Rouge, LA	Counsel for Defendant/Appellant Circuit City Stores, Inc.

* * * * * *

BEFORE: PARRO, GUIDRY, GAIDRY,
McCLENDON, AND HUGHES, JJ.
Guidry, Jr. dissents and assigns reasons.
Hughes, J. dissents with reasons.

McCLENDON, J.

Defendant, Circuit City Stores, Inc. (Circuit City), appeals the trial court's judgment in favor of plaintiffs, Wendell J. Callahan, Jr. (Callahan) and Jerome M. Cousan (Cousan). For the reasons that follow, we reverse and render.

FACTS AND PROCEDURAL HISTORY

On October 26, 2003, Michael Morris, manager of the Circuit City Store in Covington, Louisiana, observed two African-American men leaving the store under suspicious circumstances. Morris followed them out of the store and around the side of the building. Another Circuit City employee who was in his vehicle in the parking lot, Jonathan Hines, saw Morris pursuing the two men and drove up to Morris. After speaking with Morris, Hines began to follow the two men in Hines' vehicle, and contacted the St. Tammany Parish Sheriff's Office on his cell phone to report that he was following two shoplifting suspects. Hines saw the two men dump approximately twenty PlayStation 2 games outside of a Kentucky Fried Chicken restaurant and stopped to retrieve the games, during which time he lost sight of the two men. However, Hines saw the two men flee in the general direction of the nearby Wal-Mart and Hibernia Bank. After retrieving the games, Hines continued north along a service road on the west side of the Wal-Mart parking lot. While stopped at a stop sign, he noticed two individuals driving down a road on the north side of the Wal-Mart parking lot. It appeared to Hines that the driver was leaning back and covering his face, and the passenger was changing his shirt. Because Hines did not actually see the men he had been pursuing get

into a car, he quickly scanned the general area. After failing to see anyone on foot, Hines followed the vehicle, advised the dispatcher with the St. Tammany Parish Sheriff's Office, with whom he had been in constant contact since he began following the two men, and reported the license number of the car. Ultimately, the car being driven by Callahan, in which Cousan was a passenger, was pulled over by St. Tammany Parish Sheriff's Officers on Highway 190 in Covington. Hines, who was still following the vehicle, stopped at the scene. Because he admittedly could not positively identify the suspects, he called Morris. Morris came to the scene and identified Callahan and Cousan as the men who had stolen the games from the Circuit City Store. At the time Callahan and Cousan were pulled over by the sheriff's office, approximately fifteen minutes after the shoplifters fled Circuit City, Callahan was wearing a white North Caroline t-shirt, baseball cap, and blue jean shorts, and Cousan was wearing a Wendy's uniform, consisting of black pants and a dark green shirt, and had an afro hairstyle. Callahan and Cousan were placed under arrest and subsequently charged with theft by shoplifting. On March 3, 2004, however, the charges were *nolle prossed* and dismissed.

On April 27, 2004, Callahan and Cousan filed suit against Circuit City, the employees who allegedly misidentified the plaintiffs as perpetrators of a crime,[1]

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[1]The employees referenced in the petition were Morris, Hines, and Brad Adams, the individual who drove Morris to the scene of the arrest.

and Circuit City's insurer. Plaintiffs sought damages for defamation, false arrest, false imprisonment, and malicious prosecution.[2] Circuit City answered the petition asserting several affirmative defenses, including qualified immunity for those who report possible criminal activity.

Following the trial, the trial court determined that the employees of Circuit City did not act with malice, but rather, were merely negligent in their identification of Callahan and Cousan as the perpetrators of the shoplifting. Despite that finding, the trial court apparently believed that the privilege had been abused, and found in favor of the plaintiffs, Callahan and Cousan. Judgment was rendered awarding Callahan $7,500.00 in general damages and $1,583.60 in special damages and awarding Cousan $12,000.00 in general damages and $1,178.75 in special damages.

Circuit City now appeals. In its brief, Circuit City asserted that the trial court erred in: (1) granting judgment in favor of Callahan and Cousan despite the factual finding that Circuit City acted without malice, which finding entitles Circuit City to qualified immunity and judgment in its favor as a matter of law; (2) awarding unreasonable and excessive general damages to Callahan and Cousan; and (3) awarding

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[2]Callahan and Cousan specified additional items of general and special damages, some of which included attorney fees related to the defense and expungement of criminal charges, costs of arrest, and cost of recovering an impounded vehicle.

attorney's fees to Callahan and Cousan when such fees are not authorized by statute or contract.

APPLICABLE LEGAL PRECEPTS

Liability and Qualified Immunity

As stated above, all of Callahan and Cousan's claims for damages are based on the misidentification of them as perpetrators of a shoplifting at the Circuit City store in Covington. The Louisiana Supreme Court in **Kennedy v. Sheriff of East Baton Rouge,** 05-1418, p. 19 (La. 7/10/06), 935 So.2d 669, 683, reiterated the longstanding practice of the courts of this state of recognizing that the public has an interest in bringing possible criminal activity to the attention of the proper authorities, and, on that basis, extending a qualified privilege to such reports made in good faith. Specifically, **Kennedy**, 2005-1418 at p. 19, 935 So.2d at 683, provided the following policy reasons as support for the extension of such a privilege:

> It would be self-defeating for society to impose civil liability on a citizen for inaccurately reporting criminal conduct with no intent to mislead. If the risks to the citizen are too high, a fertile field for criminal suppression will have disappeared.
>
> In other words, the qualified or conditional privilege extended to communication of alleged wrongful acts to the officials authorized to protect the public from such acts is founded on a

> strong public policy consideration: vital to our system of justice is that there be the ability to communicate to police officers the alleged wrongful acts of others without fear of civil action for honest mistakes.

The **Kennedy** court then outlined the two-step process for determining whether a conditional privilege exists. In the first step, it must be determined whether the attending circumstances of a communication occasion a qualified privilege. If so, the plaintiff must show in the second step that the privilege has been abused. A determination of whether the privilege has been abused requires an examination of the grounds for abuse, that is, malice or lack of good faith. **Kennedy**, 05-1418 at p. 18, 935 So.2d at 682. The court also noted that the first step is generally determined by the court as a matter of law, but the second step of determining abuse of a conditional privilege is generally a fact question for the jury, unless only one conclusion can be drawn from the evidence. **Kennedy**, 05-1418 at p. 18, 935 So.2d at 682.

The practical effect of the defendant's assertion of the conditional or qualified privilege is to rebut the plaintiff's allegations of malice, or reckless disregard, and to place the burden of proof on the plaintiff to establish abuse of the asserted privilege. **Kennedy**, 05-1418 at p. 20, 935 So.2d at 683. To establish an abuse of the privilege, a plaintiff must demonstrate that the person communicating alleged wrongful acts to an official, one authorized to protect the public from

such acts, either knows the matter to be false, which constitutes malice, or acts with a reckless disregard for the truth. **Kennedy**, 05-1418 at pp. 22-23, 935 So.2d at 684-685.

To prove reckless disregard, the plaintiff must show that the communication was made despite the reporter's belief that it was probably false. Proof of gross negligence in the communication of a false statement is insufficient to prove reckless disregard. **Kennedy**, 05-1418 at pp. 28-29, 935 So.2d at 688. The court in **Kennedy** explained that the conduct constituting reckless disregard is typically found where a story is fabricated by the defendant, is the product of his imagination, or is so inherently improbable that only a reckless man would have communicated it. **Kennedy**, 05-1418 at p. 30, 935 So.2d at 689. Mere negligence as to falsity is not sufficient to prove abuse of the privilege, and the failure to investigate a matter fully before contacting police also does not present a jury question on whether a statement was communicated with reckless disregard for the truth. **Kennedy**, 05-1418 at p. 31, 935 So.2d at 689.

In support of this heightened standard, the court stated:

> [A]doption of the knowing falsity or reckless disregard for the truth standard of abuse in this case, which involves a report to law enforcement officers of suspected criminal activity, strikes a necessary and appropriate

> balance between a person's interest in protecting his or her reputation and the need to encourage individuals to report suspected criminal activity to the proper authorities without fear of being exposed to civil liability for honest mistakes. Unless such protection is extended, fear of being exposed to civil liability could discourage individuals from alerting police to suspicious activity, thereby enabling criminals to escape detection and endangering other potential victims. Individuals who engage in behavior beneficial to society should not be penalized by facing exposure to civil liability for mistakes in judgment attributable to simple negligence.

Kennedy, 05-1418 at p. 24, 935 So.2d at 685-86.

ANALYSIS

The authorities were in contact with Hines during the chase, and were aware that Hines had stopped to collect the merchandise. The deputy wrote in his report that Hines, after collecting the merchandise, "proceeded to where he had last seen the subjects . . ." Thus, the authorities knew or should have known that Hines briefly lost sight of the suspects. Hines never claimed that he saw the faces of the suspects or that he continually had the suspects in his sight. Because he could not identify the men after the car was stopped by the deputies, he called Morris.

At the trial on March 16, 2006, Morris stated that he got a good look at the face of one male, but could not see the face of the other. Morris testified that the man whose face he saw was wearing a white t-shirt and long blue jeans. Although the other man was also wearing long blue jeans, he had on a dark colored t-shirt. Morris also testified that both men had short hairstyles. Admittedly, Morris primarily based his identification of Cousan on the fact that he was with Callahan, the man whose face Morris believed he had seen.

In his report to the deputy on the scene of the arrest, Morris included a brief description of the clothing worn by the two males Morris observed in the store. He did not attempt to hide any discrepancies in the descriptions. Thus, the deputy had sufficient information to realize that the description of the clothing worn by the suspects in the store differed from that worn by the plaintiffs when they were stopped and arrested by the deputies.

After a thorough review of the record, especially in light of the statements made by Morris and Hines to deputies, we see no error in the trial court's finding that defendants' actions constituted mere negligence, without malice. Specifically on the absence of malice question, the record contains no evidence that, at the time of the communication, the defendants knew that their report to the police was false. Thus, plaintiffs failed in their burden to show abuse of privilege based on a finding of malice.

In addition, the record does not establish that the defendants' communications to the proper authorities were fabricated, a product of their imagination, or "so inherently improbable that only a reckless man would have put it in circulation." **Kennedy**, 05-1418 at p. 30, 935 So.2d 689. Thus, the plaintiffs failed in their burden to prove that defendants acted with reckless disregard for the truth and abused their privilege on that basis.

However, despite the trial court's finding that the defendants' misidentification was merely negligent, and the record's lack of support to establish an abuse of the asserted conditional privilege, the trial court committed reversible error by failing to apply the privilege. Even if the trial court had found gross negligence in the communications, and the record supported that finding, such a finding would not be sufficient to prove an abuse of the privilege asserted by defendants for reporting the possibility of criminal behavior.[3]

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[3]We note that the **Kennedy** case was decided after the trial court signed the judgment in the instant case. However, neither party disputes that **Kennedy** is applicable to the instant appeal. Further, we note that an appellate court is bound to adjudge a case before it in accordance with the applicable law existing at the time of its decision. **Segura v. Frank**, 93-1271, pp. 15-16 (La. 1/14/94), 630 So.2d 714, 725, cert. denied, sub nom., **Allstate Insurance Co. v. Louisiana Insurance Guaranty Association**, 511 U.S. 1141, 114 S.Ct. 2165, 128 L.Ed.2d 807 (1994). Even before **Kennedy**, plaintiffs were required to prove malice as part of their prima facie case. See **Kennedy**, 05-1418 at p. 4, 935 So.2d at 674; **O'Conner v. Hammond Police Dept.**, 439 So.2d 558, 561 (La.App. 1 Cir. 1983); **Keppard v. AFC Enterprises, Inc.**, 00-2474, p. 7 (La.App. 4 Cir. 11/28/01), 802

See **Kennedy**, 05-1418 at p. 30; 935 So.2d at 689.

CONCLUSION

For the foregoing reasons, we hold that the defendants' negligent communications were conditionally privileged, we reverse the judgment of the trial court, and we dismiss the suit against the defendants. The costs of the trial and appeal are to be borne by the appellees, Wendell J. Callahan, Jr. and Jerome M. Cousan.

REVERSED AND RENDERED.

So.2d 959, 965.

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT
NO. 2006 CA 1663

WENDELL J. CALLAHAN AND
JEROME M. COUSAN
VERSUS
CIRCUIT CITY STORES, INC.,
EMPLOYEES A, B, AND C OF
CIRCUIT CITY STORES, INC., AND
XYZ INSURANCE COMPANY

GUIDRY, J., dissents and assigns reasons.

GUIDRY, J. dissenting.

While I agree with the majority that Kennedy is dispositive of the matter before us, there are several key distinctions between Kennedy and the instant case. First, Kennedy was decided on review of a motion for summary judgment, whereas in the instant case, we have a fully developed trial record from which to determine the facts. Additionally, in Kennedy the defendants fully disclosed all of the known facts regarding the suspected wrongful acts in making a report to law enforcement, unlike the instant case where there is a misidentification of an alleged perpetrator and an alleged failure to disclose the suspect basis of that identification.

At trial Morris testified that he saw two African-American males run into a cardboard merchaniser in the front of the store and knock some movies down.

When the men attempted to pick up the movies, Morris noticed that they could not bend at the waist or bend their legs. Morris stated that he got a good look at the face of one male, but could not see the face of the other. Morris indicated that the man whose face he saw was wearing a white t-shirt and long blue jeans, but had on a dark colored t-shirt. Morris also indicated that both men had short hairstyles. Further, Morris stated that when he followed the two men from the store, they had difficulty walking because it appeared they had merchandise stuffed down the legs of their pants.

At the time Callahan and Cousan were pulled over by the sheriff's office, which was only approximately fifteen minutes from the time the shoplifters fled Circuit City, Callahan was wearing a white North Carolina t-shirt, baseball cap, and blue jean shorts and Cousan was wearing a Wendy's uniform, consisting of black pants and a dark green shirt, and had a distinctive afro hairstyle. Despite this marked difference in appearance, and despite the fact that Morris never actually saw the second man's face, he positively identified Callahan and Cousan as the perpetrators of the shoplifting at Circuit City. Additionally, Morris testified that the main basis for his identification of Cousan was the fact that he was with Callahan. However, more importantly, Morris neglected to provide the sheriff's officers with any of this information so that they could perform their own further independent investigation of the facts prior to concluding there existed probable cause to arrest Callahan and Cousan. Because his positive identifications were so inherently improbable under

the circumstances, Morris was clearly reckless in communicating them to the sheriff's officers at the scene without further disclosure.

Additionally, with regard to Hines, he was not in the Circuit City store when the alleged shoplifting took place and clearly stated at trial that he never saw the faces of the men he followed from the area of the store. Further, when Hines stopped to retrieve the video games, he admittedly lost sight of the two men as they ran across the median toward the Wal-Mart shopping center. Hines proceeded to the Wal-Mart parking lot, noticed a vehicle leaving the parking lot, but continued to look for the individuals on foot. When Hines did not see the men he had been chasing, he proceeded to follow and report Callahan and Cousan's vehicle simply because he saw it leave the parking lot. Despite the break in his chase and his admitted inability to identify the faces of the perpetrators of the shoplifting, Hines nevertheless reported Callahan and Cousan's car to the sheriff's office as containing the shoplifting suspects. In so doing, he failed to disclose at that time the above circumstances, which could have been evaluated by the sheriff's officers in determining whether there existed a lawful basis to stop and arrest Callahan and Cousan. Hines admitted that he had reasonable doubt that these were the same men that he had been chasing, yet despite that doubt, he gave the sheriff's office the license plate number of Callahan and Cousan's car. Accordingly, Hines clearly acted with reckless disregard in reporting Callahan and Cousan's car to the sheriff's office as containing the suspects of the shoplifting.

Therefore, while the circumstances of the communication occasion a qualified privilege, namely the reporting of criminal activity and the identification of suspected criminals, Callahan and Cousan have clearly shown that under the specific facts of this case Circuit City abused that privilege. The record establishes that based on the circumstances known by both Morris and Hines, which were not shared with the sheriff's officers, only a reckless man would have given the statements they gave. Under the particular facts of this case, Circuit City clearly abused its privilege. Accordingly, I respectfully dissent from the majority's opinion.

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT
NO. 2006 CA 1663

WENDELL J. CALLAHAN AND
JEROME M. COUSAN
VERSUS
CIRCUIT CITY STORES, INC.,
EMPLOYEES A, B, AND C OF
CIRCUIT CITY STORES, INC., AND
XYZ INSURANCE COMPANY

HUGHES, J., dissenting.

It is respectfully submitted that a distinction should be drawn between false statements that send innocent people to jail, and mere name calling, and that a gross negligence standard should be used to analyze the former.

We may all agree that it's a good thing for citizens to report suspicious activity to the police without fear of civil litigation. By taking criminals off the streets and setting an example we prevent innocent people from suffering. But what happens when reports to the police *cause* innocent people to suffer? What happens when innocent people are handcuffed, taken to jail, and lose their jobs? Is it "modern" thought that it's better to punish an occasional innocent man than to allow the guilty to slip through he net?

In **Kennedy v. Sheriff of East Baton Rouge**, 935 So.2d 669 (La.2006), the supreme court, in the context of a "defamation" claim, extended to the privilege for the communication of alleged wrongful acts to an official authorized to protect the public from such acts the standard that to prove abuse of the privilege a plaintiff must show knowledge or reckless disregard as to the falsity of the offending speech, as set forth in **Trentecosta v. Beck**, 703 So.2d 552 (La.1997).

Yet **Trentecosta** involved a public official plaintiff in a pure defamation context. In **Kennedy** and in the instant case, we are dealing with private individuals who went to jail as a result of the false communication. This is not Oscar Wilde being called a name. This is sticks and stones, actual physical loss of liberty because of a false statement. The false statement, privileged generally to protect the innocent from potential suffering, thus causes *actual* suffering to the innocent.

By what standard is this privilege to be measured? As the **Kennedy** court acknowledged, a state's interest in compensating injury to individuals is greater in the case of private individuals than for public officials and public figures, because private individuals characteristically have less access to channels of effective communication to counteract false statements.

The supreme court in **Kennedy** found that for a harmed plaintiff to overcome the privilege, or show that the privilege had been abused, the plaintiff would

be held to an "actual malice" standard; that is, that the false statement was made with knowing falsity or reckless disregard for the truth. The supreme court went on to hold that even proof of gross negligence would be insufficient to prove reckless disregard, citing **Davis v. Borsky**, 660 So.2d 17 (La.1995) and **Masson v. New Yorker Magazine, Inc.**, 501 U.S. 496, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991).

Again, however, the pronouncement in **Davis v. Borsky** involves a public official, and is dicta. ("*Even if* a public official plaintiff demonstrates that a defendant was grossly negligent...) (emphasis supplied). Likewise, **Masson** involved a public figure. The Court held the public plaintiff could recover only by showing "actual malice," not "mere negligence." The term "gross negligence" was not addressed.

It is respectfully submitted that the law applied to a literary or political dust-up is procrustean when applied to an innocent private individual who ends up in jail as the result of a false statement. Gross negligence should not be excluded from the analysis when loss of liberty results. "Reckless" by definition does not rise to the level of intentional or knowing behavior. Supreme Court cases that included "reckless disregard" to water down the harsh actual malice standard should not be used to raise the bar for private individuals who suffer actual, physical damage.

The **Kennedy** court also acknowledged that the issue of whether a conditional privilege has been

abused is generally a fact question for the jury or finder of fact.

In **Kennedy** a late-night fast food establishment especially geared up to take in as much cash as possible failed to recognize legal tender of the United States because the picture of Benjamin Franklin was "small," and given these doubts did not have the commonly used special pen to simply test the bill, which is exactly what the sheriff's office did in order to release plaintiff from custody. Instead, they shot from the hip and immediately called the police.

While we certainly want to excuse good faith, honest mistakes in reporting crimes, a more flexible justice would allow the issue of gross negligence to be considered by the fact finder when an actual loss of liberty occurs. False statements that send the innocent to jail should be scrutinized more closely than mere name calling, even while recognizing and protecting the privilege for reports to the police. A constitutionally based conditional or qualified privilege becomes meaningless when it results in the loss of the ultimate constitutional right, liberty. There should be no hesitation to call the police, but there should be some thought.

In the instant case I would affirm the findings of the trial court after a full trial on the merits for the reasons set forth by Judge Guidry in his dissent, and therefore I respectfully dissent.

22nd JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY
STATE OF LOUISIANA
NO. 2004-12002, Div. "I"

WENDELL J. CALLAHAN, JR. and
JEROME M. COUSAN
versus
CIRCUIT CITY STORES, INC., *et al.*

* *

TRANSCRIPT OF PROCEEDINGS taken before the Honorable Reginald Badeaux, Judge Presiding, 22nd Judicial District Court, Parish of St. Tammany, State of Louisiana, on the 16th day of March, 2006, in Covington, Louisiana.

* * * * *

THE COURT:

> First, let me say it's refreshing to have a trial to where I can say everybody's telling the truth, except Mr. Cousan, who may have embellished his lost wages a little bit.
>
> For the record, I'm going to put this down as my finding of facts in this matter. I think the facts will clearly support that Mr. Callahan and Mr. Cousan were in the wrong place at the wrong time. The evidence supports that they were leaving the Wal-Mart store in Covington at or about 4:33 p.m. on October 26, 2003. While at the same time, or there about, two similarly dressed gentlemen were attempting a

perpetration of a major felony over at the Circuit City Store on 190 in Covington, about a quarter mile away.

Mr. Morris followed those individuals from his store where he was the manager. He then assigned Mr. Hines, another employee, who was in a vehicle, to follow them with a goal towards seeing what vehicle they got in to get a description of the vehicle and the license plate, so they could report that to the authorities.

Of course, Mr. Hines, in tailing the individuals, stopped for some amount of time, probably not too long, but as fast as everything was happening a couple of minutes is crucial here, to retrieve the merchandise that the thieves were dumping by the Kentucky Fried Chicken. He admits he lost sight of the individuals; he saw them heading in a north/northwesterly direction – northeasterly, I believe that is – towards the north side of the Wal-Mart parking lot, toward the area of the Sonic.

After he collected the merchandise he got out and continued to that side. When he came to the stop sign there at the service road by the Hibernia, as I understand where he was, he turned right toward Sonic and immediately saw a gold Cutlass coming, Mr. Callahan's car, and saw what he thought were some fervid movements of the people in the

car. But he admits he could not get a good look at their faces, enough to identify them. Because when they were stopped by the police, just a few minutes later, he was unable to identify them, except for the car that he had seen. He made a cursory look around the Sonic; didn't see anybody who looked like the individuals he had been chasing. Of course, from their waist up they looked very similar to the people who he had seen by Kentucky Fried Chicken; the same people Mr. Morris saw. One had a white shirt, one had a dark shirt.

It's admitted that they were traveling at a high rate of speed, but I can't necessarily say that they were speeding to try to escape. It's a reasonable explanation by Mr. Cousan that they were trying to get back to his aunt's house to get his cap for his uniform for work at Wendy's.

While it's true there's plenty of jurisprudence, there's no statute or any other written law, but it is written jurisprudence in a number of cases that a misidentification made honestly and without malice is a bar to recovery for damages. However, in looking at those cases, the majority of those cases involve very brief detentions. While I believe Mr. Morris had no malice in his heart and he honestly believes that Mr. Callahan was the same person he saw in the store, I

think he was mistaken in his identification of Mr. Callahan. Even more so in the case of Mr. Cousan, because he admits he could not recognize him specifically because he did not look at him that intently in the store. I think he must have seen somebody very similar to Mr. Callahan in his store.

I think, also, I'm inferring from the facts and the quick time frame everything went down, that he had a lot of assumptions at that time. I can understand his frustration with shoplifters. My wife had a store she had to close recently and shoplifters were a big part of that in my mind. It's unbelievable how much they can steal from you. And I'm sure every Circuit City store he's managed suffers losses in the tens of thousands every year in stolen merchandise.

But I think he made some assumptions with Mr. Hines. I don't think it was clear to him at the time that Mr. Hines had lost track of these individuals by sight, and he should have made sure of that. I think he is negligent in that regard. I think he was negligent and he should have looked more closely at how Mr. Callahan was dressed. Because I think the facts show that Mr. Callahan was dressed the same as he left the Wal-Mart store as when he got arrested. He wasn't wearing dark blue

jeans, he had light blue knee-length shorts on.

To that extent, in applying these facts to the duty risk analysis I find that Circuit City is liable through respondents unto the plaintiffs for the negligent misidentification of them. This wasn't a case where they were detained at the store for an hour, and the police showed up and they realized they had nothing and they went on their way. Which there is a specific statute on that for shopkeepers to detain people they have reason to believe are committing a theft for up to an hour.

As I alluded to earlier, this case is on both sides. But I find the facts of this case fall on the side in favor of the plaintiffs.

Briefly applying those facts to the duty risk analysis: (1) the defendants' conduct was the cause in fact of plaintiffs' injuries; i.e., their arrests. No doubt about that.

Perhaps the biggest stumbling block is Number (2) part of the analysis, defendants' conduct failed to conform to the appropriate standards of reasonable persons under like circumstances. That was the hardest part for me. I find that Mr. Morris did violate that, as I've already stated, negligently. He should have made extra certain that these individuals were the same exact ones.

He did not get a full view, by his own testimony, of Mr. Callahan, it was obstructed in some way, whether he was behind a car door on the other side of the car when he stepped out of the car, he just saw him from the waist up and said, yeah, that's him. And by his own testimony – And it's reasonable to assume that if he had been correct that Mr. Cousan was his accomplice, since birds of a feather do flock together, he was wrong in this case. And I find negligently so.

I find that he also had a duty to conform his conduct to a specific standard. That is, when you're going to have somebody arrested you have to be absolutely sure and remove all doubt. I don't think he took enough steps to remove all doubts from his mind or to question that doubt.

Number (4), the defendants' conduct was the legal cause of the plaintiffs' injuries. That was the false imprisonment, having their car towed, having to bond out of jail, having to get a lawyer, having to come to court several times. In Mr. Callahan's case, he was in court several times also for revocation hearings, pending the new arrest; spending several days around this place as a result of that. I can certainly attest to happens all the time.

Concerning Mr. Cousan, I believe he lost his job for violating the no call/no show policy. He had some lost wages too, which are the actual damages.

As to Mr. Callahan, I find his damages: Lost wages at $405; cost of the towing of his vehicle, $123.60; his attorney's fees for handling this matter – as I understood from the testimony, he split that with Mr. Cousan. So I give him $500 for the attorney's fees to see the case through to getting dismissed; another $500 for his having to pay to have the charges expunged. So the special damages I find to be in Mr. Callahan's behalf: $1528.60. For the emotional distress, embarrassment, and inconvenience, I award him $7500.00. For a total of $9028.60.

As to Mr. Cousan, he contradicts himself on the amount of lost wages. Here he testified it took him three months, but it was pointed out in his deposition that he had said two weeks. So calculating his lost wages at 7-1/2 hours a day, five days a week, at $6.50 for two weeks, that's $243.75. Plus $500 for legal fees. Also – I'm sorry, I didn't see it – I'm leaving out $380.00 for bondsman; $55 for sheriff's fee – all that goes for Mr. Callahan as well. I need to add in $55 for paperwork fee because he had a signature bond.

Okay, that would bring Cousan's special damages to $1168.05. Plus, for emotional distress, embarrassment, and inconvenience due to the arrest, $12,000. That brings his total to $13,160.75 and Mr. Cousan's total to $9083.63. Plus interest from date of judicial demand and for all costs of this prosecution.

Let me just, lastly, add, I make this decision because while I understand the need to report a crime and although I understand that Mr. Morris had no malice, instead he was merely just negligent, I can't give Circuit City a pass on this. The resulting damage was just too much to have these guys yanked out of their car, arrested, thrown in jail. In Mr. Cousan's case, spend the night in a holding cell on a concrete floor, have to go to court; in Mr. Callahan's case, several times, and incur all these expenses and then tell them, sorry, there was no mal intent.

That's the judgment of the Court. Plaintiffs' attorneys, prepare a judgment and submit it to the Court within the next ten days. Thank you.

(THEREUPON, THE PROCEEDINGS WERE ENDED)

22nd JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY
STATE OF LOUISIANA
NO. 2004-12002, DIV. "I"

WENDELL J. CALLAHAN, JR. and
JEROME M. COUSAN
versus
CIRCUIT CITY STORES, INC., *et al.*

JUDGMENT

This matter came on for trial on the merits on the 16th day of March, 2006;

PRESENT: Emery Voorhies
Maurice Le Gardeur
Attorneys for Plaintiffs

Robert W. Barton
Matthew L. Mullins
Attorney for Defendants

The court now concluding that the law and evidence are in favor of the plaintiffs for the oral reasons assigned on March 16, 2006;

IT IS ORDERED, ADJUDGED AND DECREED

That there be judgment herein in favor of plaintiff, Wendell J. Callahan, Jr., and against defendant, Circuit City Stores, Inc., for general damages in the amount of $7,500.00 plus special damages in the amount of $1,583.60 plus judicial interest on these amounts from the date of demand until paid, and for all costs of these proceedings;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Jerome Cousan, and against defendant, Circuit City Stores, Inc., for general damages in the amount of $12,000.00 plus special damages in the amount of $1,178.75 plus judicial interest on these amounts from the date of demand, and for all costs of these proceedings.

Judgment read, rendered and signed on this 21st day of March, 2006 in Covington, Louisiana.

/s/ Reginald Badeaux
Judge, Division "I"
22nd Judicial District Court

Respectfully submitted,
Le Gardeur, Ltd.

/s/ Maurice Le Gardeur
Trial Attorney
304 E. Boston Street
Covington, LA 70433
Phone: (985) 892-1420
Fax: (985) 892-1797

Pursuant to Uniform District Court Rule 9.5, undersigned counsel certifies that this Order was faxed to opposing counsel on March 16, 2006, that all suggested revisions have been made thereto, and that no opposition was received to it as of its presentation to this Court, over three (3) working days from its original delivery.

/s/ Maurice Le Gardeur

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT
NO. 2006-CA-1663

WENDELL J. CALLAHAN, JR. and
JEROME COUSAN, *Applicants*
versus
CIRCUIT CITY STORES, INC., *et al.*
Respondent

APPLICATION FOR REHEARING *EN BANC*

NOW INTO COURT, through undersigned counsel, come applicants, Wendell Callahan and Jerome Cousan, who for the reasons hereinafter stated and the brief filed herewith, are aggrieved by the judgment of this Honorable Court reversing the judgment of the Honorable Reginald Badeaux, judge of the 22 nd Judicial District Court, which awarded them general and special damages for defamation and negligent misidentification.

1.

Judge Badeaux, Judge Guidry, and Judge Hughes were right. In the context of these facts, *Kennedy*[1] is inapposite. Unlike *Kennedy,* this was not a case of "no harm, no foul". *Kennedy* involved simple "defamation" type damages, whereas this case additionally involved wrongful arrest, jailing, prosecution, and the loss of livelihood.

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[1] *Kennedy v. Sheriff of East Baton Rouge*, 935 So.2d 669, 2005-1418 (La. 7/10/06)

2.

But for the fortuitous Walmart videotape, Callahan and Cousan, both innocent victims, would have been convicted of felony theft and would have spent several years in jail. Despite Walmart's videotape and a *nolle prosequi* by the District Attorney, Circuit City's employees and their counsel unapologetically, unreasonably, and *maliciously* continued to defame the plaintiffs throughout this civil trial by insisting they were the perpetrators. Under these exceptional circumstances, Judges Badeaux, Guidry, and Hughes would not give Circuit City a pass for this irresponsible, callous and reckless behavior and neither should a majority of this Court.

3.

The First Amendment right to free speech should never trump the Fourth Amendment right to personal liberty and freedom from arrest and prosecution. The malice standard adopted by *Kennedy* sets the bar too high. A lesser standard is required because of the interests involved - personal liberty and freedom. To hold otherwise constitutes a denial of constitutional access to the courts and fair reparation for extraordinary harm and damages.

4.

LSA-C.Cr.P. Art. 215 should have been applied as the proper standard to determine whether Circuit City was immune from liability, not the malice standard adopted by *Kennedy*.

5.

Because of the 3-2 split decision by this First Circuit panel and the importance of this case to the orderly administration of justice and the need for

fair compensation to unnecessarily aggrieved parties, applicants pray for an *en banc* rehearing and thereafter a reinstatement of the judgment of the lower court.

WHEREFORE, applicants pray under Rule 2-18.1 of the Uniform Rules of the Court of Appeal that an *EN BANC* REHEARING be granted in this matter to reconsider the aforementioned issues and that after due proceedings had, there be judgment herein affirming the judgment of the 22 nd Judicial District Court in all respects.

Respectfully submitted,

Le Gardeur, Ltd.

/s/ Maurice Le Gardeur
Maurice Le Gardeur (#8274)
304 E. Boston Street
Covington, LA 70433
Phone: (985) 892-1420
-and-
Emery Voorhies
616 E. Boston St.
Covington, LA 70433
985.898.0940 Phone
985.893-2184 Fax

CERTIFICATE OF SERVICE

I hereby certify that on this 23 rd day of October, 2007, a copy of the foregoing has been served on the following interested parties by

depositing same in the U.S. Mail, properly addressed and first class postage prepaid:

Robert W. Barton
Matthew L. Mullins
Counsel for Circuit City Stores, Inc.
Defendant/Respondent
Taylor, Porter, Brooks & Phillips, LLP
451 Florida St., 8th Fl.
P.O. Box 2471
Baton Rouge, LA 70821

/s/ Maurice Le Gardeur

22nd JUDICIAL DISTRICT COURT
PARISH OF ST. TAMMANY
STATE OF LOUISIANA
NO. 2004-12002, DIVISION "I"

WENDELL J. CALLAHAN, JR. AND
JEROME M. COUSAN
VS.
CIRCUIT CITY STORES INC., *et al.*

ANSWER AND REQUEST FOR JURY TRIAL

NOW INTO COURT, through undersigned counsel, comes defendant, Circuit City Stores, Inc. ("Circuit City") in the above entitled and numbered cause, and for answer to the petition in suit for personal injury filed by plaintiffs denies each and every allegation of the said petition except as may hereinafter be specifically and unequivocally admitted, and, further answering, with respect to each specific paragraph and allegation, represents and responds that:

1.

It is acknowledged that Circuit City is sought to be made a defendant, and its status is admitted; all other allegations are denied.

2.

Denied for lack of sufficient information to justify belief.

3.

Denied for lack of sufficient information to justify belief.

4.

Denied for lack of sufficient information to justify belief.

5.

Denied for lack of sufficient information to justify belief.

6.

Denied for lack of sufficient information to justify belief.

7.

Denied for lack of sufficient information to justify belief.

8.

Denied for lack of sufficient information to justify belief.

9.

Denied for lack of sufficient information to justify belief.

10.

Denied for lack of sufficient information to justify belief.

11.

These allegations do not require a response of Circuit City; however, if such a response is required then these allegations are denied for lack of sufficient information to justify belief.

12.

These allegations do not require a response of Circuit City; however, if such a response is required then these allegations are denied for lack of sufficient information to justify belief.

13.

Denied (except for the allegation of course and scope, which is presently denied for lack of sufficient information to justify belief).

14.

Denied (except for the allegation of course and scope, which is presently denied for lack of sufficient information to justify belief).

15.

Denied (except for the allegation of course and scope, which is presently denied for lack of sufficient information to justify belief).

AND NOW, further responding, Circuit City asserts the following affirmative defenses:

16.

Circuit City and anyone for whom it could be held responsible acted properly and within the appropriate standard of care at all times.

17.

Circuit City is not responsible for the fault and/or unreasonableness, and/or intentional misconduct, if any, of the St. Tammany Parish Sheriff's Office, its deputies, or other employees, or any other third persons or parties involved in the situation and events as presented in the plaintiffs' petition for damages.

18.

Additionally, Circuit City's actions do not expose it, or anyone for whom it could be held responsible, to liability, because Circuit City's actions were reasonable, in good faith and entitled to qualified immunity, all within the ambit or protection afforded

by Louisiana statutory and jurisprudential law and precedent.

19.

Circuit City requests a trial by jury.

20.

In truth and in fact, the plaintiffs, if guilty of shoplifting and/or theft, and/or other similar criminal law violations, do not have a cause of action against Circuit City, and/or would be 100% responsible and comparatively at fault in causing the events described in the petition for damages.

21.

In truth and in fact, the plaintiffs were not detained by Circuit City or anyone for whom it could be held responsible, nor did Circuit City, or anyone for whom it could be held responsible, make the decision to arrest and detain the plaintiffs.

WHEREFORE, Circuit City prays that this Answer and Request for Jury Trial be deemed good and sufficient and that, after proper notice, due process and trial by jury, judgment be rendered in Circuit City's favor, dismissing plaintiffs' lawsuit, with prejudice at plaintiffs' costs.

By Attorneys,
TAYLOR, PORTER, BROOKS & PHILLIPS, L.L.P.

By: /s/ Robert W. Barton
T. MacDougall Womack, #36138
Robert W. Barton, #22936
451 Florida Street, 8th Floor
P.O. Box 2471
Baton Rouge, LA 70821
Telephone: 225-387-3221

Telecopier: 225-346-8049
Attorneys for Defendant, Circuit City Stores, Inc.

- CERTIFICATE -
I certify that a copy of the foregoing was this day mailed, postage prepaid, to

Maurice Le Gardeur
Le Gardeur, Ltd.
304 E. Boston Street
Covington, LA 70433

Baton Rouge, Louisiana, this 18th day of May, 2004.

/s/ Robert W. Barton

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No. 07-1401

FILED

JUL 8 - 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

WENDELL J. CALLAHAN, JR.
and
JEROME M. COUSAN,

Petitioners,

v.

CIRCUIT CITY STORES, INC.,

Respondent.

On Petition for Writ of Certiorari to the Louisiana Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

E. Duncan Getchell, Jr.
Counsel of Record
Robert L. Hodges
McGuireWoods LLP
One James Center
901 East Cary Street
Richmond, VA 23219
Tel: (804) 775-4319
Fax: (804) 698-2061

Robert W. Barton
Taylor, Porter, Brooks & Phillips, LLP
Post Office Box 2471
451 Florida Street
Suite 800
Baton Rouge, LA 70821
Tel: (225) 381-0215
Fax: (225) 346-8049

Counsel for Respondent

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

Corporate Disclosure Statement

Circuit City Stores, Inc is a publicly-traded corporation

Counterstatement of Jurisdiction

Contrary to the averments of the petitioners (Petition at 1), this case does not present an issue of federal law. Instead, the Louisiana First Circuit Court of Appeals concluded that this case is controlled by the decision of the Louisiana Supreme Court in *Kennedy v. Sheriff of East Baton Rouge*, 935 So.2d 669 (La. 2006). *Kennedy*, in turn, insofar as it is relevant to this case, adopted a knowing or reckless disregard standard for overcoming the qualified privilege attaching to reports of suspected criminal conduct made to the police.

In this garden variety false arrest/defamation case, the First and Third Questions Presented argue only that state law has been misapplied, arguments further developed in the body of the Petition. As such these questions do not properly invoke this Court's jurisdiction. The Second Question presented argues that the First Amendment analysis of the *Kennedy* court effects a violation of the Fourth Amendment. A close look at this question reveals that this is really a state law claim. Furthermore, this alleged federal issue is not pursued in the body of the Petition and must be deemed waived. In the body of the brief the Fourth Amendment is invoked only as a basis for distinguishing *Kennedy*'s application to the facts of this case. Furthermore, in adopting Restatement (Second) of Torts § 600 in *Kennedy*, the Louisiana Supreme Court assigned a number of policy reasons. One of them was "the desire to simplify and create consistency between constitutional law and state law definitions of fault and malice as respects the tort of defamation." 935

So.2d at 685. Because the state Supreme Court did not hold that its decision was constitutionally compelled under federal law, it decided no federal question, but merely assigned a motive for exercising its common law jurisdiction in the fashion it chose.

Finally, petitioners do not satisfy the requirements of Supreme Court Rule 14(g)(i), by showing both in the court of first instance and in the appellate courts where the federal questions sought to be reviewed were raised, the method or manner of raising them and the way in which they were passed on by those courts, so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. Petitioners assert only that they raised their Fourth Amendment concerns in their petition for rehearing *en banc* before the Louisiana Court of Appeals. (*See* Petition, at 5, citing A-32). This Court has generally refused to consider issues raised for the first time in a petition for rehearing when the state court is silent on the question. *Adams v. Robertson*, 520 U.S. 83, 89 n. 3 (1997). *Adams v. Robertson*, 520 U.S. at 86-89 sets out the burden on the petitioner to show that the question presented in this Court was properly raised and preserved in the courts below. The lack of such proper presentation here is no better illustrated than by contrasting the opening heading of the petitioner's argument "*Kennedy* is inapposite" (Petition, at 9) with the opinion of the Louisiana Court of Appeals (A-10 n. 3) observing that "neither party disputes that *Kennedy* is applicable to the present appeal."

Consequently, the petitioners have neither presented, nor demonstrated preservation of, a federal question, nor laid a proper foundation in this Court for review by certiorari. *See also* Rule 14.4 ("The Failure of a Petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a Petition.")

Reasons Why the Writ Should Be Denied

Petitioners present three questions for review. The first asks whether the appellate courts of Louisiana properly granted qualified immunity. This presents an issue entirely of state law. So also with the third question, which argues, based upon a Louisiana statute, that some rule other than that adopted by the Supreme Court of Louisiana in *Kennedy* should apply to the facts of this case.

The remaining question as stated by petitioners is whether it is a violation of the Fourth Amendment due process right to be free from unlawful arrest for a court to adopt a particular rule of qualified immunity motivated in part by First Amendment concerns.

In considering this question the Court should note that Rule 14(g) has not been satisfied; that the question is not developed in or even discussed by the courts below; the question is not argued substantively in the body of the brief but only as a basis for distinguishing state law; and the question does not present anything recognizable as a live issue in current legal thought. Fundamentally, the

issue presented is still an interpretation and application of state law. The issues in the case involve the scope of a state law defense to a state tort claim.

CONCLUSION

Because there is no federal issue presented in the case; because no federal issue has been shown to have been raised or preserved below; and because the only question which attempts to raise a federal claim raises no substantial, real, and live issue of federal constitutional law, there is no basis for this Court to exercise its *certiorari* jurisdiction, and the petition should be denied.

Respectfully Submitted,

CIRCUIT CITY STORES, INC.

E. Duncan Getchell, Jr.,
counsel of record
Robert L. Hodges
McGuireWoods LLP
One James Center
901 East Cary Street
Richmond, VA. 23219
Tel: (804) 775-1000
Fax: (804) 698-2061

Robert W. Barton
Taylor, Porter, Brooks
& Phillips, LLP
P.O. Box 2471
451 Florida St., Suite 800
Baton Rouge, LA. 70821
(70801)
Tel: (225) 381-0215
Fax: (225) 346-8049

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NO. 07-1401

In the Supreme Court of the United States

WENDELL J. CALLAHAN, JR. and
JEROME M. COUSAN,
Petitioners

v.

CIRCUIT CITY STORES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
Louisiana Supreme Court
New Orleans, Louisiana, No. 2007-C-2424

REPLY BRIEF

EMERY VOORHIES
616 E. Boston St.
Covington, LA 70433
Phone: (985) 898-0940
La. Bar Roll #13124
Counsel of Record for Petitioners

Maurice Le Gardeur
222 N. Massachusetts St.
Covington, LA 70433
Phone: (985) 892-1420
La. Bar Roll #8274

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The opponent's brief alleges that petitioners have raised no federal issues below; additionally, the opponent alleges that any federal questions which were raised were untimely; therefore, there is no basis for this Court to exercise its *certiorari* jurisdiction. These allegations are patently untrue.

The opponent, Circuit City, was the first litigant to assert its First Amendment right of free speech as a good faith immunity defense to this defamation suit (which was recognized by the Louisiana Supreme Court in *Kennedy*[1], decided by the Louisiana Supreme Court while the instant case was on appeal to the Louisiana First Circuit Court of Appeal.) This *federal question* was not merely a matter of state law as fully discussed in *Kennedy*. As Louisiana Supreme Court Justice Weimer said in *Kennedy*:

> *Whether First Amendment restraints supercede the presumptions of falsity, malice (or fault), and injury that would ordinarily obtain under Louisiana law when a statement is defamatory per se depends upon whether the constitutional protections extended to media defendants in Gertz and Philadelphia Newspapers obtain where the defendant is a private, non-media defendant, a question the Supreme Court has not squarely answered.*

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[1] *Kennedy v. Sheriff of East Baton Rouge,* 935 So.2d 669 at 677, 2005-1418 (La. 7/10/06).

Clearly the Louisiana Supreme Court considered it was dealing with *federal questions* as opposed to the mere application of state law to this alleged *garden variety false arrest/defamation case,* to use opponent's words[2].

By following *Kennedy,* the appellate courts of Louisiana have impermissibly extended the good faith immunity defense sought by Circuit City beyond mere defamatory statements under the First Amendment to a grant of conditional immunity for a clear violation of an innocent victim's Fourth Amendment right to be free from wrongful arrest. The exercise of constitutional rights under the First Amendment should never override the protections afforded innocent victims under the Fourth Amendment. That's what happened in this case and this result should not be countenanced and/or ignored by this Court.

By awarding damages to petitioners, Callahan and Cousan, the trial court refused to apply the good faith immunity sought by Circuit City. Only after the reversal of petitioners' damage awards was it necessary for petitioners to raise Fourth Amendment concerns which were clearly stated in petitioners' application for rehearing, as follows:

> *The First Amendment right to free speech should never trump the Fourth Amendment right to personal liberty and*

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[2]Opponent's Brief in Opposition to Petition for Writ of Certiorari, p. 1.

> *freedom from arrest and prosecution. The malice standard adopted by Kennedy sets the bar too high. A lesser standard is required because of the interests involved - personal liberty and freedom. To hold otherwise constitutes a denial of constitutional access to the courts and fair reparation for extraordinary harm and damages.* [p. A-33, paragraph 3, Petition for Writ of Certiorari]

Under the peculiar procedural posture of this case, the constitutional issues were properly and timely raised and preserved for review by this Court.

Contrary to opponent's assertion, "[F]urthermore, this alleged federal issue is not pursued in the body of the Petition and must be deemed waived,"[3] the constitutional issue; i.e., that the First Amendment analysis of the *Kennedy* court effects a violation of the Fourth Amendment, was directly addressed in the body of the brief by adopting the language of dissenting Judge Hughes, who was quoted as follows:

* * * * *

> *False statements that send the innocent to jail should be scrutinized more closely than mere name calling, even while recognizing and protecting the privilege for reports to the police. A*

---

[3]Opponent's Brief in Opposition to Petition for Writ of Certiorari, p. 1.

> *constitutionally based conditional or qualified privilege becomes meaningless when it results in the loss of the ultimate constitutional right, liberty.*[4]

Petitioners did all that was required to preserve these federal constitutional questions. Opponent's mischaracterization of these issues as merely matters of state law deprecates the serious harm suffered by the petitioners due to the violation of their Fourth Amendment rights.

The alleged exercise of opponent's First Amendment right of free speech to report suspected criminal activity should not immunize opponent from damages unless the victim carries an insurmountable burden to prove this report was done maliciously *vice* unreasonably. The Fourth Amendment protects against *unreasonable* searches and seizures, not just *malicious* searches and seizures.

The Louisiana Supreme Court in *Kennedy* has rewritten the Fourth Amendment to the U.S. Constitution to add this unconstitutional condition. This Court should correct this grievous error.

---

[4]Petitioners' Original Petition for Writ of Certiorari, p. 19.

Respectfully submitted,

EMERY VOORHIES
616 E. Boston St.
Covington, LA 70433
Phone: (985) 898-0940
La. Bar Roll #13124
Counsel of Record for Petitioners

Maurice Le Gardeur
222 N. Massachusetts St.
Covington, LA 70433
Phone: (985) 892-1420
La. Bar Roll #8274